

New Jersey Division on Civil Rights
Office of the Attorney General



Director's Orders Compendium

2005

CIVIL RIGHTS

JON S. CORZINE
Governor

ZULIMA V. FARBER
Attorney General

J. FRANK VESPA-PAPALEO
Director, NJ Division on Civil Rights

JOANNE SERVAIS v. TOWNSHIP OF FAIRFIELD

Joanne Servais (Complainant) filed a verified complaint with the Division alleging that the Township of Fairfield (Respondent) denied her reappointment to her prior position as municipal housing/zoning officer based on her race (Caucasian). Following an administrative hearing, the Administrative Law Judge (ALJ) issued an initial decision in favor of Complainant, awarding her backpay with interest, damages for pain and humiliation, and assessing a statutory penalty. Specifically, the ALJ determined that Complainant presented sufficient direct and circumstantial evidence to establish that Respondent was motivated by race in appointing a Black male to the position instead of reappointing Complainant. In evaluating the circumstantial evidence, the ALJ noted that more rigorous prima facie standards must be applied to reverse discrimination cases, but found that Complainant presented sufficient evidence to meet that heightened burden. The Director agreed with the ALJ's determination that Complainant established both by direct and circumstantial evidence that Respondent unlawfully discriminated against her based on her race. The Director adopted the ALJ's backpay award, but concluded that the evidence presented, including the

testimony that Complainant suffered physical manifestations of her emotional distress which required medical treatment and prescription medication, warranted increasing the emotional distress damages to \$7,500. The Director also concluded that the evidence presented warranted a statutory penalty of \$7,500 in this case.

Respondent appealed the Director's decision to the Appellate Division of the Superior Court of New Jersey. On September 24, 2004, the Appellate Division ruled that the Director's factual findings and legal conclusions were amply supported by the credible evidence, but remanded the case for the Director to address the defense of legislative immunity, which Respondent raised for the first time on appeal. The Director concluded that the doctrine of legislative immunity could not protect Respondent from liability for its race-based employment decision, because its race-based decision to replace Complainant with an African American was an administrative or managerial function rather than a legislative function. Respondent has filed an appeal of the Director's decision on the legislative immunity issue.

DCR Docket No. :
EF05RM-40805-E

OAL Docket No. :
CRT 2483-01

D.O. Issued:
April 23, 2003
(Original Order);
February 2, 2005
(Order on Remand)

TRACY SWINT v. DISTINCTIVE MARKETING, INC., and DIANE SPENCER

Tracy Swint (Complainant) filed a verified complaint with the Division alleging that her employer discriminated against her and terminated her employment based on her creed (Muslim) in violation of the LAD. Specifically, the complaint alleged that the owner of the company, Diane Spencer, informed Complainant that she would be terminated if she wore Muslim attire to work, and that before discharging Complainant, Ms. Spencer stated that she "could not deal with everyone's religion." Following an administrative hearing, the Administrative Law Judge (ALJ) issued an initial decision dismissing the complaint. The ALJ concluded that Complainant failed to prove that the employer's articulated reasons for discharging her - - poor performance and a decline in business - - were pretext for religious discrimination.

After reviewing the ALJ's recommended decision, the Director concluded that the ALJ failed to make factual findings on certain material issues in dispute, including some evidence which, if found to be credible, would constitute direct evidence of religious discrimination and require application of different legal standards. The Director found that, because the record included conflicting testimony on material issues, it was necessary for the ALJ, who heard the testimony and had the opportunity to observe the demeanor of the witnesses, to assess witness credibility and make factual findings based on those assessments. For this reason, the Director remanded this matter to the ALJ to make credibility determinations and factual findings on specific disputed issues, and to apply the appropriate legal standards based on those factual findings.

DCR Docket No.:
EG13CB-45919OAL Docket No.:
CRT 7149-03D.O. Issued:
May 31, 2005

JEANNETTE T. GABRIEL v. NEW JERSEY DEPARTMENT OF TREASURY

Jeanette T. Gabriel (Complainant) filed a verified complaint with the Division alleging that the N.J. Department of Treasury (Respondent) discriminated against her by paying her less than similarly situated male employees in violation of the Law Against Discrimination. Complainant contended that she was more highly educated than her male counterparts, yet Respondent offered them a higher starting salary. Respondent asserted that no violation of the LAD occurred because each employee was offered starting salaries commensurate to his or her municipal background or unique experience which brought skills to the Department of Treasury which were highly relevant to its mandate. Therefore, Complainant's gender was not a factor in determining her starting salary. Following a hearing at the Office of Administrative Law, the Administrative Law Judge (ALJ) dismissed Complainant's claim finding that the reasons proffered by Respondents were credible,

legitimate, non-discriminatory, and sufficient to rebut Complainant's prima facie case of gender discrimination.

The Director found that the ALJ's findings and conclusions were well supported, and the objective documentary evidence corroborated Respondent's legitimate non-discriminatory reasons for offering Complainant a lower starting salary than her male counterparts. The ALJ also found that Respondent offered evidence that both male and female applicants who did not possess the unique municipal experience were offered a lower starting salary than other male and female applicants who did in fact possess the skills that Respondent deemed worthy of a higher starting salary. The Director adopted the ALJ's initial decision and dismissed Complainant's claim.

DCR Docket No.:
EL11WG-46100-EOAL Docket No.:
CRT 06388-01SD.O. Issued:
June 14, 2005

PATRICIA A. FLORENCE v. NEW JERSEY DEPARTMENT OF STATE

Complainant Patricia A. Florence filed a complaint with the Division alleging that the N.J. Department of State (Respondent) discriminated against her on the basis of her disability by refusing to provide her reasonable accommodation, in violation of the Law Against Discrimination. The matter was transmitted to the Office of Administrative Law (OAL) at Complainant's request. After providing a detailed account of the protracted procedural history in this case, the Administrative Law Judge (ALJ) issued an initial decision dismissing the complaint because Complainant unreasonably failed to prosecute her verified complaint.

The Director issued an order adopting the initial decision, finding that the record provided a sufficient basis to adopt the ALJ's dismissal. Specifically, the record showed that Complainant failed to sign a settlement

agreement arranged by the parties' representatives and twice fired her attorney on the eve of a hearing. Additionally, Complainant failed to appear at a scheduled hearing and failed to provide an explanation. Complainant also failed to respond to Respondent's motion to dismiss filed at the OAL. Moreover, Complainant did not request an extension to file exceptions to the initial decision, and failed to file such exceptions with the Division. Complainant expressed no desire to pursue this matter with the OAL or the Division, either with a substitution of counsel or on a pro se basis. Accordingly, the Director found that there was a sufficient basis to adopt the ALJ's conclusion that Complainant's lack of cooperation caused delay, inconvenience, and expense for which there was no satisfactory explanation. The Director dismissed Complainant's claim pursuant to his authority under N.J.A.C. 13:4-1.3.

DCR Docket No.:
EL11HG-46255OAL Docket No.:
CRT 6025-1D.O. Issued:
July 6, 2005**MICHAEL HEUSSER v. NJ HIGHWAY AUTHORITY**

This order addressed the issue of attorney's fees to be awarded to a prevailing complainant. Michael Heusser (Complainant) had alleged that the N.J. Highway Authority (Respondent) unlawfully demoted him based on his disability in violation of the Law Against Discrimination. The Director issued orders which concluded that Respondent discriminated against Complainant, awarded damages to Complainant, and assessed a penalty. These decisions did not address the issue of attorneys fees owed Complainant as a prevailing party.

After a hearing, the Office of Administrative Law issued a decision awarding Complainant \$380,068.86 in attorneys fees and costs. After review of the exceptions and replies, the Director issued an order in which the following determinations were made:

- Costs for expert witnesses were awarded to Complainant;

- Counsel's rates for travel time were reduced by fifty percent;
- Historic hourly rates plus accrued interest, instead of current hourly rates, were awarded for services performed by per diem attorneys utilized by a supervising attorney;
- An enhancement of ten percent was added to the lodestar amount awarded;
- Fee application work was excluded from the lodestar, and remunerated at a rate of two-thirds the rate awarded for the case in chief;
- In certain circumstances, fees were not be awarded for work performed on unsuccessful motions;
- While a claim for attorneys fees which significantly exceeds the amount awarded in damages will not automatically be rejected, those fees requested will be subject to a higher level of scrutiny.

The order modified the attorneys fees and costs to total \$456,082.22.

DCR Docket No.:
EB27HL-33396OAL Docket No.:
CRT 01863-98D.O. Issued:
August 30, 2005

CARL E. MOEBIS, SR., v. INTERNATIONAL CORPORATE MARKETING GROUP;
PAT RYAN, DIRECTOR OF PLAN DESIGN; AND MICHAEL JANDOLI, VICE
PRESIDENT OF SYSTEMS, INDIVIDUALLY,

On September 20, 2001, Carl Moebis (Complainant) filed a verified complaint with the Division charging that International Corporate Marketing Group et al. (Respondents) violated the LAD by refusing to accommodate his disability because of his age, national origin, and disability. Respondents denied the charges. On July 15, 2005, Respondents filed a motion before the Office of Administrative Law (OAL) to enforce a settlement that they contended had been agreed to by the attorneys representing the parties. On August 17, 2005, the Administrative Law Judge (ALJ) issued an initial decision granting Respondents' motion and ordering that the terms of the settlement be given full force and effect. Complainant filed pro se exceptions on September 1, 2005 alleging that he did not agree to settlement terms, and that his attorney did not respond to his concerns about the proposed settlement agreement.

After reviewing the record, the Director rejected the ALJ's order that the terms of the proposed settlement be given full force and effect. The Director found that a settlement, like any contract, is enforceable only if the parties agree on essential terms and manifest

an intention to be bound by those terms. Moreover, negotiations of an attorney are not binding on the client unless the client has expressly authorized the settlement or the client's voluntary acts have given the attorney apparent authority to enter into a settlement, not just negotiations. Further, the Director found that a hearing is to be held to establish the intentions of the parties unless the available competent evidence, considered in a light most favorable to the non-moving party (i.e., Complainant), is insufficient to permit the judge to conclude that there was no binding settlement. Based on these legal standards and the record before him, the Director concluded that such a hearing is necessary to determine if the parties entered into an enforceable settlement. Accordingly, the Director ordered that the parties independently attempt to settle this matter within 30 days. If the parties fail to either settle this matter or agree to participate in mediation within 30 days of this Order, the Director ordered that this matter be remanded to the OAL for a hearing to determine whether the parties have entered into an enforceable settlement contract disposing of Complainant's LAD complaint.

DCR Docket No.:
EP11WB-47626-E

OAL Docket No.:
CRT 6850-2003S

D.O. Issued:
October 18, 2005

KATHLEEN CONNORS RYAN v. FREEHOLD REGIONAL HIGH SCHOOL DISTRICT

Complainant Kathleen Connors Ryan alleged that the Freehold Regional High School District (Respondent) refused to hire her because of her gender and in reprisal for asserting her rights under the New Jersey Law Against Discrimination (LAD) and the New Jersey Family Leave Act (FLA). Following an administrative hearing, the administrative law judge (ALJ) concluded that Respondent was motivated by gender discrimination and reprisal for Complainant's prior FLA claim in rejecting Complainant for hire. The ALJ Awarded Complainant backpay, and compensation for pain and humiliation. The ALJ also ordered Respondent to hire Complainant for the next available similarly situated position, and to continue backpay until hire.

By order dated November 10, 2005, the Director adopted the ALJ's conclusion that Respondent refused to hire Complainant in reprisal for her prior FLA claim, but found insufficient evidence in the record to support the ALJ's conclusion that Respondent was also motivated by gender discrimination. The Director imposed a statutory penalty and awarded Complainant pain and humiliation damages, but reduced the ALJ's recommended award. The Director then requested supplemental information from the parties to calculate the backpay award and counsel fees. After receiving stipulations from the parties regarding the amount of backpay and counsel fees, the Director issued a supplemental order awarding Complainant \$25,000 in pain and humiliation damages, \$305,025.28 in backpay, and awarding \$25,717.5 in counsel fees.

DCR Docket No.:
EN12WE-46074-EOAL Docket No.:
CRT 6101-03D.O. Issued:
November 10, 2005
/ January 11, 2006

MARGIE HALL v. THE REEVES FOUNDATION

Complainant Margie Hall filed a verified complaint with the Division alleging that The Reeves Foundation (Respondent) terminated her employment based on her age, in violation of the New Jersey Law Against Discrimination. Following an administrative hearing, the Administrative Law Judge (ALJ) issued an initial decision dismissing the complaint. The ALJ found that Complainant quit her job, and thus failed to prove an essential element of a prima facie case of discriminatory discharge. The ALJ further concluded that even if Complainant had presented a prima facie case, she presented insufficient evidence that her employer's articulated reasons were pretext for age discrimination.

The Director adopted the ALJ's recommended dismissal of the complaint. After adopting the

ALJ's conclusion that Respondent did not actually terminate Complainant's employment, the Director also evaluated the evidence to determine whether the events constituted a constructive discharge. Based on the ALJ's factual findings, the Director concluded that Complainant failed to prove that she was subjected to employment conditions so intolerable that a reasonable person would feel compelled to resign, and thus concluded that Complainant was not constructively discharged. Finally, the Director concluded that even if Complainant had established a prima facie case, she failed to prove that her employer was motivated by age discrimination in making plans to replace Complainant after she spoke of her intent to retire.

DCR Docket No.:
EV18AB-46781OAL Docket No.:
CRT 7965-04D.O. Issued:
December 13, 2005